(1)

Supreme Court, U.S.
FILED

97 1210 JAN 20 1998

OFFICE OF THE CLERK

No._____

IN THE

Supreme Court of the United States

OCTOBER, TERM, 1997

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Petitioner,

vs.

BPS CLINICAL LABORATORIES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF APPEALS OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF APPEALS OF THE STATE OF MICHIGAN

Of Counsel
RICHARD JOHN MATHEWS
Blue Cross and Blue Shield
of Michigan
600 Lafayette East, Suite 1925
Detroit, MI 48226-1098
(313) 225-0095

ROBERT P. HURLBERT
Counsel of Record
JOSEPH A. FINK
ROBERT W. POWELL
FRANCIS R. ORTIZ
Dickinson Wright, PLLC
500 Woodward Avenue
Suite 4000
Detroit, MI 48225
(313) 223-3500

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

31pp

QUESTION PRESENTED

A. Did the state court improperly hold that Plaintiff's action claiming an entitlement to greater reimbursement benefits under the General Motors/UAW self-insured ERISA plan was not preempted by ERISA, thereby subjecting ERISA plans to state-mandated reimbursement levels and the likelihood of different and conflicting benefit requirements in each of the 50 states, and severely limiting the ability of ERISA plans to adopt cost-saving measures that enhance the financial stability of ERISA plans?

B. Does the state court decision conflict with this Court's prior precedent on the scope of ERISA preemption including this Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans vs. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed 2nd 695 (1995) and undermine the purpose and policy served by ERISA preemption?

THE PARTIES

Petitioner Blue Cross and Blue Shield of Michigan is a non-profit health care corporation incorporated under the laws of the State of Michigan which acts as the claims administrator for a self-insured employee benefit plan ("the Plan") established by General Motors Corporation through collective bargaining with the United Automobile Workers Association. Respondents are medical laboratories and physicians who seek to participate in or obtain higher levels of reimbursement under the Plan's Premier Prudent Laboratory Use Program ("Premier PLUS"). The Respondents are all Michigan corporations or physicians and consist of BPS Clinical Laboratories, Michigan Clinical Laboratory, MML, Inc., MBL Laboratories, Flint Medical Laboratory, Allied Medical Laboratory-Flint, Inc., William E. Blarney, D.O., Robert Chatfield, D.O., Mid-Michigan Pathology Services, P.C., and Universal Standard Medical Laboratories, Inc.

RULE 29.6 STATEMENT

Petitioner Blue Cross and Blue Shield of Michigan has no parent companies. It has interests in non-wholly owned subsidiaries, Global Health Options, LLC and Health First, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

THE PARTIES ii

RULE 29.6 STATEMENT ii

INDEX OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. SUMMARY OF ARGUMENT 9

II. THE MICHIGAN DECISION DIRECTLY CONFLICTS WITH THIS COURT'S ERISA PREEMPTION DECISIONS, INCLUDING TRAVELERS 10

A. The Travelers Decision Did Not Change ERISA Preemption Law In The Core Areas of Plan Administration And Benefits 10

B. Michigan's PPA Regulates, And Mandates, Core Decisions Regarding ERISA Plan Administration And Benefit Payments 12

III. THIS COURT'S EMPHASIS ON THE LIMITATIONS OF ERISA PREEMPTION IN TRAVELERS HAS CAUSED LOWER COURTS TO IMPROPERLY ALLOW STATE REGULATION OF THE TERMS AND ADMINISTRATION OF ERISA PLANS 18

A. The Travelers Decision Has Erroneously Been Interpreted As A Retreat From ERISA Preemption Even In Core Areas of Plan Administration And Benefits 18

B. This Case Presents An Important And Recurring Issue Of Whether State Preferred Provider Laws Can Regulate ERISA Self-Insured Plans 21

CONCLUSION 24

INDEX OF AUTHORITIES

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S. Ct. 1895, 68 L. Ed.2d 402 (1981) 13

American Drug Stores, Inc. v. Harvard Pilgrim Health Care, Inc., 973 F. Supp. 60 (D. Mass. 1997) 20, 21

Boggs v. Boggs, U.S. , 117 S. Ct. 1754, 138 L. Ed.2d 45 (1997) 11

California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., U.S. , 117 S. Ct. 832, 136 L. Ed.2d 791 (1997) 11

CIGNA Healthplan of Louisiana, Inc. v. State of Louisiana, 82 F.3d 642 (5th Cir. 1996) cert den. 117 S. Ct. 387 (1996) 13, 17

DeBuono v. NYSA — ICLA Medical and Clinical Services Fund, U.S. , 117 S. Ct. 1747, 138 L. Ed.2d 21 (1997) 11, 21

FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed.2d 356 (1990) 11, 13

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed.2d 474 (1990) 11

Napoletano vs. Cigna Health Care of Connecticut, Inc., 238 Conn. 216, 680.A.2d. 127 (1996) cert. den. 117 S. Ct. 1106 (1997) 19, 21

New York State Conference of Blue Cross and Blue Shield Plans v Travelers Ins. Co., 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed 2nd 695 (1995) .... passim

Pilot Life Insurance Co. vs. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed.2d 39 (1987) 20

Prudential Insurance Company of America v. National Park Medical Center, Inc., 964 F. Supp. 1285 (E.D. Ark. 1997) 16

Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed.2d 490 (1983) 11, 12

Stuart Circle Hospital Corp. vs. Aetna Health Management, 995 F2d 500 (4th Cir 1993) cert. den. 510 U.S. 1003 (1993) 6, 16

Zuniga v. Blue Cross and Blue Shield of Michigan, 52 F.3d 1395 (6th Cir. 1995) 15

STATUES

28 USC § 1257 2

29 U.S.C. § 1144 2

MCL 550.51 1

MCL 550.53 5

MCL 550.1101 4

OTHER AUTHORITIES

Ondrasik, *The Travelers Decision — One Year Later — Much Ado About Nothing?*, 5 No. 4 ERISA Litig. Rep. 4, 12-13 (1996) 20

OPINIONS BELOW

On October 9, 1991, the Wayne County Circuit Court issued an order in which it refused to consider whether Plaintiff's state law claims were preempted by the Employee Retirement Income Security Act ("ERISA"), but granted Blue Cross and Blue Shield of Michigan ("BCBSM") summary disposition except for Plaintiffs' claim under the Michigan Prudent Purchaser Act ("PPA"), MCL § 550.51; MSA § 24.650(51). The trial court found that BCBSM had violated the PPA by refusing to consider the applications of the plaintiff laboratories to participate in the Premier Plus program of the GMC/UAW Plan. This order is unreported and is reproduced at Appendix E.

Both sides appealed to the Michigan Court of Appeals, and in an opinion issued September 6, 1994, *BPS Clinical Laboratories, Inc. v. Blue Cross and Blue Shield of Michigan*, 206 Mich App 570, 522 NW2d 902 (1994), the Michigan Court of Appeals reversed in part, and affirmed in part, holding that all of Plaintiffs' claims were preempted by ERISA. This opinion is reproduced at Appendix D.

Plaintiffs appealed and in an order reported at *BPS Clinical Laboratories, Inc. v. Blue Cross and Blue Shield of Michigan*, 449 Mich 860, 535 NW2d 793 (1995) the Michigan Supreme Court vacated the Michigan Court of Appeals decision and remanded for reconsideration in light of this Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans vs. Travelers Ins. Co.*, 514 U. S. 645, 115 S. Ct. 1671, 131 L.Ed. 2d 695 (1995). This order is reproduced at Appendix C. On remand, the Michigan Court of Appeals, reversed its original decision and held that Plaintiff's claims were not preempted by ERISA. The second Michigan Court of Appeals' decision is reported as *BPS Laboratories vs. Blue Cross and Blue Shield of Michigan*, 217 Mich App 687, 552 NW2d 919 (1996) and is reproduced at Appendix B.

BCBSM applied for leave to appeal to the Michigan Supreme Court from the portion of the second Court of Appeals decision finding no preemption. On October 21, 1997, the Michigan Supreme Court issued an order denying BCBSM's Application for Leave to Appeal. Three of the seven justices would have granted leave to appeal. That order is currently unreported and is reproduced at Appendix A.

JURISDICTION

This Court has jurisdiction over BCBSM's Petition for a Writ of Certiorari pursuant to 28 USC § 1257 in that the decision of Michigan Court of Appeals and the order of the Michigan Supreme Court denying review, are the final judgments of the highest court of the State in which a decision could be had. Those decisions call into question the validity of a State statute as repugnant to the laws of the United States. The petition is timely under Federal Rule of Civil Procedure 13 because the petition has been filed within 90 days of the order of the Michigan Supreme Court entered on October 21, 1997, denying discretionary review of the final decision of the Michigan Court of Appeals.

STATUTES INVOLVED

The statutory provisions involved are the preemption clause of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144 (Appendix F), the Michigan Prudent Purchaser Act, MCL § 550.51, MSA § 24.605(51) (Appendix G), and the Michigan Non-Profit Health Care Corporation Reform Act (Act 350), MCL § 550.1502a; MSA 24.660(502a), (Appendix H).

STATEMENT OF THE CASE

The material facts of this case, except as noted below, are related in detail in the first decision of the Michigan Court of Appeals reported at *BPS Clinical Laboratories, Inc. vs. Blue Cross and Blue Shield of Michigan*, 206 Mich App 570, 522 N.W.2d 902 (1994). BCBSM is a Michigan non-profit health care corporation which administers claims under the collectively-bargained health care program ("the Plan") maintained by General Motors Corporation ("GMC") by agreement with the United Automobile Workers Association ("UAW"). BCBSM is a claims administrator only for the GMC/UAW Plan. Thus, BCBSM is not an insurer for the Plan beneficiaries or Plan benefits, and only provides administrative services. 522 NW2d at 903.

In 1990, at the request of GMC and UAW, BCBSM developed the Premier Prudent Laboratory Use Program ("Premier PLUS") for consideration by GMC and UAW in their contract negotiations, as a program to reduce health care costs under the Plan and insure quality medical laboratory services.

Under Premier PLUS, BCBSM established a panel of six provider laboratories which agreed to discount the rate charged to the Plan for laboratory services. The limitation on the number of panel laboratories, and financial incentives for physicians to use the panel laboratories, were necessary in order to obtain substantially discounted fees from the six panel laboratories. 522 NW2d at 906. Physician providers who referred blood specimens to a panel laboratory would receive a $3.00 blood-handling fee. The panel laboratories would be reimbursed for their full discounted fee. Physician providers who referred blood specimens to non-panel laboratories would not receive the $3.00 blood-handling fee. Non-panel laboratories would be reimbursed only for 50% of the maximum payment schedule for laboratory services under the Plan. 522 NW2d at 904. BCBSM estimated that the cost savings to the GMC/UAW Plan as a result of Premier PLUS, would be

$4.5 million the first year, $5.6 million the second year, and $6.7 million the third year. (Affidavit of David P. Mamuscia, paragraph 4). As part of their collective bargaining agreement, GMC and the UAW agreed to institute a pilot of the Premier PLUS program as part of their ERISA-regulated employee benefit plan.

Plaintiffs are laboratories that were excluded from the panel of laboratories under Premier PLUS, and physicians who have been denied the $3.00 blood-handling fee because of their reference of blood specimens to non-panel laboratories. 522 NW2d at 904. Plaintiffs alleged that the GMC/UAW Premier PLUS program violated Michigan's Prudent Purchaser Act ("PPA"), MCL § 550.51, MSA § 24.605(51) and Michigan's Non-Profit Health Care Corporation Reform Act (Act 350), MCL 550.1101 *et seq.*, MSA § 24.660(101) et seq. Those state laws purport to authorize, and to impose regulations on health care organizations entering into "prudent purchaser agreements" with health care providers. In particular, Michigan's PPA purportedly limits the extent to which BCBSM and other organizations can exclude health care providers from "prudent purchaser" programs such as Premier PLUS:

> Section 3. (1) . . . [T]he organization shall offer a prudent purchaser agreement, comparable to those agreements with other members of the provider panel, to a health care provider located within a reasonable distance from the recipients of such health care services, if a health care provider is located within that reasonable distance.
>
> (2) An organization shall give interested health care providers located in the geographic area served by the organization an opportunity to apply to the organization for membership on the provider panel.
>
> (3) Prudent purchaser agreements shall be based upon the following written standards which shall be filed by the organization with the commissioner . . .

MCL 550.53; MSA § 24.650(53). Plaintiffs also alleged state law tortious interference, antitrust, and breach of contract claims seeking to participate in Premier PLUS or to receive higher reimbursement and fees under the program. 522 NW2d at 904.

BCBSM originally removed Plaintiffs' action to Federal District Court based on the "complete preemption" doctrine under ERISA. However, the Federal District Court held that it had no jurisdiction over Plaintiffs' state law claims and remanded the case to state court. *Id.* The Michigan trial court erroneously treated the Federal Court's remand order as a finding that there was no preemption of Plaintiffs' state law claims by ERISA, and refused to further consider the issue of preemption. *Id.* The trial court granted BCBSM's motion for summary disposition on the merits of all of Plaintiffs' state law claims except for their claim under Michigan's PPA. The court found that BCBSM had violated the PPA by excluding Plaintiffs from participation as panel laboratories. *Id.* The trial court ordered BCBSM to allow Plaintiffs to apply for participation in the Premier PLUS panel of laboratories. The trial court also issued an order requiring BCBSM to submit the standards for panel membership to the Insurance Bureau for approval and to follow those standards in considering Plaintiffs' respective applications. Ultimately the trial court enjoined the operation of Premier PLUS until BCBSM filed its standards for membership in Premier PLUS and considered Plaintiffs' applications under those standards. 522 NW2d at 904-905.

BCBSM appealed the trial court orders to the Michigan Court of Appeals in that Plaintiffs' claims were preempted by ERISA. In an opinion issued September 6, 1994, the Michigan Court of Appeals reversed the trial court and held that Plaintiffs' state law claims were preempted by ERISA. The Michigan Court of Appeals held, under the well-settled ERISA preemption standards decided by this Court, that Plaintiffs' claims, if accepted, would require a change in the administration and benefits paid

under the GMC/UAW Plan in direct violation of ERISA's preemption clause. In reaching this conclusion, the Court of Appeals stated:

> The state insurance regulations that Plaintiffs seek to impose on Defendant would, if applied, force Defendant to alter the way it administers an employee health benefit plan adopted and funded by General Motors. Any finding by a court that changes Plaintiff's standing with Premier PLUS will affect General Motors distributions under the plan. If Defendant is ultimately required to consider and accept Plaintiffs as panel providers for Premier PLUS, General Motors benefit plan will be required to reimburse more providers than it had anticipated. Opening the program to other providers will also weaken the leverage needed to negotiate lower fees with a select group of providers, which is undoubtedly a key reason to adopt such a program in a self-funded plan . . . In addition, because insurance laws vary widely from state to state, applying Michigan law in this case would impair the ability of Premier PLUS to function simultaneously in a number of states for multi-jurisdictional employers such as General Motors.

522 NW2d at 906-907. The Michigan Court of Appeals also held that because the GMC/UAW Plan is self-funded, not insured, the insurance savings clause of ERISA did not apply. 522 NW2d at 907.

The Michigan Court of Appeals relied, in part, on the decision in *Stuart Circle Hospital Corp. vs. Aetna Health Management*, 995 F2d 500 (4th Cir 1993) which held that a state "any willing provider" statute which, as plaintiffs allege with respect to Michigan's PPA, required employee benefit plans to accept any provider who met objective standards, was preempted by ERISA. 522 NW2d at 907. The Michigan Court of Appeals recognized that the Michigan PPA, as applied to Premier PLUS,

was analogous to an "any willing provider" statute which would improperly regulate the administration of ERISA plans. The Michigan Court of Appeals also recognized that, because such statutes could vary from state to state, allowing such regulation of ERISA plans would prevent the uniform administration of such plans throughout the United States. This would be particularly problematic for employee benefit plans provided by national companies such as GMC. 522 NW2d at 907.

Subsequent to the Michigan Court of Appeals decision, this Court issued its decision in *New York State Conference of Blue Cross and Blue Shield Plans vs. Travelers Insurance Company*, 514 U. S. 645, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995) in which it held that a state tax which indirectly imposed an additional cost on ERISA plans was not preempted by ERISA. On Plaintiffs' Application for Leave to Appeal to the Michigan Supreme Court, the Michigan Supreme Court vacated and remanded this case to the Michigan Court of Appeals for reconsideration in light of the *Travelers* decision. 449 Mich 860, 535 NW2d 793 (1995).

On reconsideration, in an opinion issued on July 26, 1996, the Michigan Court of Appeals reversed its initial decision and held that Plaintiffs' state law claims were not preempted by ERISA. *BPS Clinical Laboratories vs. Blue Cross and Blue Shield of Michigan*, 217 Mich App 687, 552 N.W.2d 919 (1996). The Michigan Court of Appeals held that this Court's *Travelers* decision emphasized that the thrust of ERISA's preemption clause was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans. 552 NW2d at 922. Despite its initial recognition that the PPA, as applied to an ERISA-regulated plan, *would* interfere with the nationally uniform administration of such plans, on reconsideration the Michigan Court of Appeals held that Michigan's PPA would *not* interfere with such national administration. The only rationale for this decision was that Michigan's PPA applies only

to health care organizations that *voluntarily* enter into prudent purchaser agreements:

> Because the PPA does not mandate that any party enter into a prudent purchaser agreement, we hold that the Prudent Purchaser Act . . . is not preempted by the ERISA . . . We fail to see how a statute that applies only to those who choose to fall within its purview could preclude the nationally uniform administration of employee benefit plans. Unlike *Shaw* and *Metropolitan Life*, the PPA did not mandate any change in health care coverage or the administration of benefits. The act only imposed certain requirements once Defendant chose to form prudent purchaser agreements. Because we find that the PPA does not preclude the national administration of employee benefit plans, we hold that Plaintiffs' claims pursuant to the PPA are not preempted by the ERISA.

552 NW2d at 923. In its second decision, Michigan Court of Appeals did not consider that differing state regulations regarding the use of prudent purchaser agreements would impose different choices and requirements on ERISA regulated plans, or explain why the analysis of this issue in its original decision was either wrong or changed by the *Travelers* decision.

Having concluded that Plaintiffs' state law claims were not preempted by ERISA, the Michigan Court of Appeals went on to review the merits of the trial court's decisions on BCBSM's motions for summary disposition on the merits of those state law claims. The Court of Appeals held that the trial court properly granted summary disposition on all but one of Plaintiffs' claims, and held that summary disposition should have been granted on the Michigan PPA claim because Plaintiffs have no private cause of action under the PPA. However, the Michigan Court of Appeals reversed the grant of summary disposition with respect to Plaintiffs' breach of contract claims. The Court of Appeals decision left the Premier PLUS program open to regulation under

the PPA at the initiation of the Michigan Insurance Commissioner or Attorney General. 522 NW2d at 926.

BCBSM filed an Application for Leave to Appeal to the Michigan Supreme Court, but the Michigan Supreme Court denied BCBSM's application by order dated October 21, 1997. Three of the seven justices would have granted BCBSM's application.

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF ARGUMENT

This Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct, 1671, 131 L. Ed.2d 695 (1995), which emphasized the limitations on ERISA preemption in the context of a state tax law, has had the unfortunate result of convincing some lower courts that *Travelers* represents a "retreat" from prior ERISA preemption doctrine, rather than a definition of its outer boundaries. This erroneous perception of a "retreat" has led several courts, including the Michigan courts in this case, to find no preemption of state laws (such as Michigan's PPA) that go to the heart of ERISA plan administration and benefit structures.

State laws that regulate how many preferred providers an ERISA plan will utilize, how such providers are selected, and how reimbursement levels may differ between preferred and non-preferred providers, directly affect, and mandate, how the plan is administered and what benefits (through reimbursement of providers) will be paid under the plan. These types of decisions are at the core of both ERISA plan administration and the ERISA preemption provision. State regulation of these decisions will not only interfere with the administration and terms of ERISA plans, but will subject such plans to a myriad of differing state

regulations thus destroying the uniform administration of national ERISA plans.

The state court decision in this case, and in several other cases considering similar statutes, directly conflict with the ERISA preemption provision and this Court's prior ERISA preemption decisions. This Court's discussion in *Travelers* has created uncertainty as to the current scope of ERISA preemption and threatens to subject ERISA plans to state regulation even in, as here, core areas of ERISA plan and benefit administration. Conflicts in the application of ERISA preemption in the important area of preferred provider statutes, such as the Michigan PPA, have developed in the wake of *Travelers*. This Court needs to clarify its decision in *Travelers* to resolve these conflicts, preserve ERISA preemption in the core areas of plan and benefit administration, and prevent a new round of ERISA preemption litigation arising from divergent interpretations of the *Travelers* decision.

II. THE MICHIGAN DECISION DIRECTLY CONFLICTS WITH THIS COURT'S ERISA PREEMPTION DECISIONS, INCLUDING TRAVELERS

A. The *Travelers* Decision Did Not Change ERISA Preemption Law In The Core Areas of Plan Administration And Benefits

In *New York State Conference of Blue Cross and Blue Shield Plans vs. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) this Court, in contrast to some of its prior ERISA preemption decisions, emphasized the limitations on ERISA's preemption clause in ruling that a surcharge uniformly imposed on hospitals, which had the indirect effect of increasing the cost of all health benefit plans, was not preempted by ERISA. Because the statute did not directly or indirectly regulate the administration of the ERISA plan, or impose benefit

or coverage requirements on the plan, this Court held that the state tax law did not "relate to" ERISA plans and thus did not trigger the ERISA preemption clause.

However, in *Travelers* this Court did not change or limit the scope of the ERISA preemption clause as applied to state laws that *do* attempt to regulate the administration of ERISA plans or that impose particular benefit or coverage requirements on ERISA plans. On the contrary, this Court in *Travelers* reaffirmed that the purpose of the ERISA preemption clause was "to insure that plans and plan sponsors would be subject to a uniform body of benefits law" and to eliminate "conflicting directives among states or between states and the federal government . . . *requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.*" 514 U.S. at 656-657 (emphasis added). Thus, this Court expressly reaffirmed its decisions in cases such as *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, (1983); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), holding that state laws that directly or indirectly impose particular administrative requirements on ERISA plans, or require particular benefits or coverages, are preempted by ERISA and cannot be the subject of state regulation or claims. *Id.*

Nor have this Courts ERISA preemption decisions since *Travelers* altered the preemption analysis in core areas of plan administration and benefits. In *DeBuono v. NYSA - ICLA Medical and Clinical Services Fund,* U.S. , 117 S. Ct. 1747 (1997) and *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* U.S. , 117 S. Ct. 832 (1997), this Court, consistent with *Travelers,* held that state statutes that regulated or taxed certain non-plan activities, and thereby indirectly affected the cost/benefit analysis of ERISA plans in administering and structuring their plans, were not preempted by ERISA. However, in *Boggs v. Boggs,* U.S. , 117 S. Ct. 1754 (1997) this

Court held that state law regarding testamentary transfers that would affect how, and to whom, benefits under an ERISA plan would be paid, *was* preempted by ERISA, notwithstanding that the law was of general applicability and operated in an area of traditional state regulation.

Unfortunately, this Court's emphasis on the limitations of ERISA preemption in *Travelers* has led some lower courts to believe that they have been invited to adopt the kind of erroneous retrenchment of ERISA preemption that the Michigan Court of Appeals adopted in its second decision. This Court, respectfully, needs to clarify its decision in *Travelers* to make clear that no *change* in the preemption of state regulation of ERISA plans was adopted or intended by *Travelers*, and that the Court there sought merely to define the outer boundaries of ERISA preemption.

B. Michigan's PPA Regulates, And Mandates, Core Decisions Regarding ERISA Plan Administration And Benefit Payments

The second Michigan Court of Appeals decision runs directly afoul of the principles of ERISA preemption that were reaffirmed in *Travelers*. The reasoning of the Michigan Court of Appeals that Michigan's PPA does not "mandate" any particular form of plan administration, benefits, or coverage because it applies only if a plan "chooses" to enter into prudent purchaser agreements is wrong, it is illogical, and it finds no support in this Court's decision in *Travelers* or any other ERISA preemption case.

Michigan's PPA directly and explicitly prohibits an ERISA plan from adopting terms of administration and choices regarding the use of prudent purchaser agreements and programs, and the provider reimbursements (i.e., benefits) paid under such programs, different than those permitted by the statute. Prohibiting choices is just as much a mandatory regulation of the administration of ERISA plans as imposing choices. Indeed, they are the

same thing. By prohibiting certain choices a state regulation effectively mandates *other* choices. In this case, Michigan's PPA, as sought to be enforced by Respondents, would prohibit the prudent purchaser choices made by an ERISA plan that is the subject of a collectively-bargained agreement between a national employer, GMC, and a national union, the UAW. The statute thereby mandates *other* choices — i.e., either *no* prudent purchaser agreements at all or prudent purchaser agreements that comply with Michigan's regulations.

In *CIGNA Healthplan of Louisiana, Inc. v. State of Louisiana,* 82 F.3d 642 (5th Cir. 1996), decided after *Travelers,* the Fifth Circuit concluded that Louisiana's so-called "any willing provider" statute was preempted by ERISA, notwithstanding that an ERISA plan could "choose" not to have preferred provider organizations ("PPO's") at all in order to avoid the state regulation:

> In the instant case, ERISA plans that choose to offer coverage by PPO's are limited by the statute to using PPO's of a certain structure — i.e., a structure that includes every willing, licensed provider. Stated another way, the statute prohibits those ERISA plans which select to use PPO's from selecting a PPO that does not include any willing, licensed provider. As such, the statute connects with ERISA plans.
>
> Neither is it of any consequence that plans might not choose to offer coverage by PPO's: It is sufficient for preemption purposes that the statute eliminates the choice of one method of structuring benefits.

82 F.2d at 648, citing *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981) and *FMC Corp. v. Holliday,* 498 U.S. 52 (1990). In *Alessi,* this Court held preempted a state statute that "eliminate[d] one method for calculating . . . benefits . . . that is permitted by federal law." 451 U.S. at 524. In *FMC,* this Court held preempted a statute that "prohibit[ed] plans from being

structured in a manner requiring reimbursement in the event of a recovery from a third party." 498 U.S. at 60.[1]

Likewise, Michigan's PPA, by mandating the content and structure of the GMC/UAW preferred provider network of laboratories under Premier PLUS, mandates how and to whom benefits will be paid under the Plan. The "benefits" paid under Premier PLUS consist of the reimbursements and fees paid to panel and non-panel laboratories. By affecting the number and choice of panel or non-panel laboratories, Michigan's PPA directly regulates the payment of benefits and the coverage provided by the Plan. It has this effect *regardless* of whether a Plan "chooses" to forego a preferred provider network at all, or to institute one complying with Michigan regulatory requirements. Either "choice" requires different benefits and coverage than that provided by the Premier PLUS program adopted by the GMC/UAW Plan.

The Michigan court's emphasis on the "voluntary" nature of prudent purchaser agreements also completely ignores the substantial likelihood that other states will prohibit or allow *different* regulatory choices with respect to prudent purchaser agreements. Thus, a plan offered by a national employer and union, such as GMC and UAW, might find it advantageous to enter into certain prudent purchaser agreements or programs in states other than Michigan, but to adopt different administration and coverage in Michigan in order to avoid the regulations imposed by the Michigan PPA. This is exactly the type of "tailoring" of plans to

---

[1] When this Court in *Travelers* said that the statute at issue in that case was not preempted, in part, because it did not "mandate choices" by ERISA plans, it was referring to statutes that, through regulation of some other activity, merely affect an ERISA plans' cost/benefit analysis without dictating particular outcomes. It was not referring to statutes that prohibit, rather than impose, particular forms of plan administration and benefits. As shown above, this is a distinction without a difference and either form of state regulation of plan administration or benefits — prohibitions or mandates — runs afoul of ERISA's preemption provision.

meet the "peculiarities" of different jurisdictions that ERISA preemption was intended to prevent and that *Travelers* expressly condemned. The threat of differing regulations and peculiarities with respect to the state laws governing ERISA plans could not be more stark and manifest than in this case.

A number of cases decided after this Court's decision in *Travelers*, like the Fifth Circuit's *CIGNA* decision discussed above, have recognized that state statutes like Michigan's PPA, that regulate an ERISA plan's decisions regarding its use and reimbursement of preferred and non-preferred providers go to the heart of the administration of such plans and are preempted by ERISA.

In *Zuniga v. Blue Cross and Blue Shield of Michigan*, 52 F.3d 1395 (6th Cir. 1995), the Sixth Circuit Court of Appeals recognized that state law claims by providers seeking to participate in, and receive payment under, an ERISA plan's preferred provider network would directly impact plan administration and payment of benefits under the plan:

> [T]he relief Zuniga seeks is to be reinstated as a preferred provider, which means being paid under the terms of the plans for his treatment of covered patients .... We agree ... that Zuniga's breach of contract claim necessitates an evaluation of an employee benefit plan, specifically how it selects preferred providers and its assessment of overutilization. Thus, that claim "relates to" an employee benefit plan and is preempted by ERISA.

52 F.3d at 1402. The Sixth Circuit characterized this relation as "not tenuous or remote but obvious." *Id.*

In a perceptive and well-reasoned opinion, decided after-*Travelers*, the U.S. District Court for the Eastern District of Arkansas recognized that state regulation of an ERISA plan's

preferred provider networks and reimbursement directly impacts plan administration and benefits:

> [T]he [Arkansas] PPA's "Any Willing Provider" clause prevents the plan administrator from differentiating between providers in the direct payment of benefit claims. Under the PPA, the choice of whether a given provider will be a participating or a nonparticipating provider is taken from the plan and given to the individual provider.
>
> * * *
>
> Preferred provider arrangements . . . are the principal means by which employee benefit plans deliver their promised medical benefits; as such, regulation of the structure of the PPO network necessarily affects the benefit plans and thus relates to them.

Prudential Insurance Company of America v. National Park Medical Center, Inc., 964 F. Supp. 1285, 1293, 1295 (E.D. Ark. 1997) (quoting, in part, *Stuart Circle Hospital Corp. v. Aetna Health Management*, 800 F. Supp. 328 (E.D. Va. 1992) vac. on other gds. 995 F.2d 500 (4th Cir. 1993). Because of this effect on important administrative and *benefit* decisions, the Court recognized that regulation of preferred provider networks is at the "core" of ERISA preemption:

> The Supreme Court, in *Travelers*, emphasized that where there is either direct or indirect impact on ERISA plans' structure, content, and administration, such regulation implicates the very core of ERISA preemption . . . This Court holds that the virtual elimination of the limited provider network has a direct impact on the structure, content and administration of health benefit plans, which triggers the preemptive provisions of ERISA.

964 F. Supp. at 1295. District Court also expressly recognized that the wide variety of state regulation of provider networks, if not preempted, would prevent the uniform administration of ERISA health benefit plans. 964 F. Supp. at 1296.

The Fifth Circuit in *CIGNA* expressly recognized that ERISA's preemption of state regulation of the use of preferred provider networks by ERISA plans was unaffected by this Court's *Travelers* decision:

> Unlike the New York statute at issue in *Travelers,* Louisiana's Any Willing Provider statute specifically mandates that certain benefits available to ERISA plans must be constructed in a particular manner. In other words, the Louisiana statute does not merely raise the cost of the implicated benefits; it delineates their very structure. As such, the statute falls outside the purview of the limited *Travelers* holding: The Court there repeatedly recognized that ERISA preempts "state laws that mandate employee benefit structures." Accordingly, we hold that the *Travelers* decision leaves undisturbed our conclusion that Louisiana's Any Willing Provider statute is preempted by ERISA.

82 F.3d at 649.

The Michigan Court of Appeals, in its initial decision, accurately explained exactly how Michigan's PPA imposes direct regulation on ERISA plans with respect to plan administration and benefits and directly threatens the uniform administration of ERISA plans through varying state regulation:

> The state insurance regulations that Plaintiffs seek to impose on Defendant would, if applied, force Defendant to alter the way it administers an employee health benefit plan adopted and funded by General Motors. *Any finding by a court that changes Plaintiffs standing with Premier PLUS will affect General Motors' distributions under the plan.* If Defendant is

> ultimately required to consider and accept Plaintiffs as panel providers for Premier PLUS, *General Motors' benefit plan will be required to reimburse more providers then it anticipated.* Opening the program to other providers will also weaken the leverage needed to negotiate lower fees with a select group of providers, which is undoubtedly a key reason to adopt such a program in a self-funded plan . . . In addition, because insurance laws vary widely from state to state, applying Michigan law in this case would impair the ability of Premier PLUS to function simultaneously in a number of states for multi-jurisdictional employers such as General Motors.

522 NW2d at 906-907. The second Michigan Court of Appeals opinion never explains why the rationale of the first opinion was erroneous or how it was changed by this Court's decision in *Travelers.* In fact, it was not. The first Michigan Court of Appeals opinion was correct and should have been adhered to by the Michigan Supreme Court and Court of Appeals.

III. THIS COURT'S EMPHASIS ON THE LIMITATIONS OF ERISA PREEMPTION IN *TRAVELERS* HAS CAUSED LOWER COURTS TO IMPROPERLY ALLOW STATE REGULATION OF THE TERMS AND ADMINISTRATION OF ERISA PLANS

A. The *Travelers* Decision Has Erroneously Been Interpreted As A Retreat From ERISA Preemption Even In Core Areas of Plan Administration And Benefits

Based on the foregoing discussion, state laws and claims regulating the structure and terms of provider networks and provider payments should be clearly preempted by ERISA. Unfortunately, however, this Court's decision in *Travelers* has affected significantly the ERISA preemption analysis by some state

and lower federal courts. Rather than properly treating *Travelers* as a case defining the outer limits of ERISA preemption, many courts have viewed it as a retreat from, or restriction of, prior ERISA preemption doctrine. A number of courts have used this Court's discussion in *Travelers* regarding the limitations of ERISA preemption to uphold state laws that clearly regulate ERISA plan administration. While this has affected several areas, it has had particular detrimental impact in the important area of the terms and administration of preferred provider networks such as Premier PLUS.

For example, the Connecticut Supreme Court in *Napoletano vs. Cigna Health Care of Connecticut, Inc.*, 238 Conn. 216, 680. A.2d. 127 (1996) claimed that "[T]here is a general consensus that, in *Travelers Ins. Co.*, the Supreme Court indicated a retreat from preemption." 680 A.2d at 140, fn. 1. In holding that Connecticut's "any willing provider" statute was *not* preempted by ERISA, the Connecticut Supreme Court reasoned that the statute did not "relate to" the administration of employee benefit plans, and that the Plaintiffs seeking relief under the statute sought only to enforce the employee benefit plan as written. As one commentator on the *Napoletano* decision has observed:

> *Given that Plaintiffs were both challenging the physician's removal from the provider network and seeking their reinstatement as preferred providers, the notion that Plaintiffs claims had nothing to do with plan administration is — at least in the author's view – remarkable.* However, the court went on to compound its error by concluding that those claims were beyond ERISA's preemptive scope because they did no more than seek "to enforce the benefit plan that [Cigna] has already established and is maintaining. . . . *The court's suggestion that ERISA does not preempt state law claims that merely seek to enforce employee benefit plans is dead wrong, and directly contrary to Travelers itself.* ERISA's civil enforcement scheme, of course, expressly

> authorizes civil actions to enforce employee benefit plans, and it is well established, at least since the Supreme Court's decision in *Pilot Life Insurance Co. vs. Dedeaux*, 481 U. S. 41 (1987), that such scheme is the "exclusive" vehicle available to enforce rights allegedly arising under a benefit plan. . . . ***Moreover, as noted earlier, the assertion that state claims which challenge and seek to overturn plan administrative decisions for non-compliance with the plan itself have no relationship to plan administration is mind-boggling.***

Ondrasik, *The Travelers Decision — One Year Later — Much Ado About Nothing?*, 5 No. 4 ERISA Litig. Rep. 4, 12-13 (1996) (emphasis added).

Similarly, in *American Drug Stores, Inc. v. Harvard Pilgrim Health Care, Inc.*, 973 F. Supp. 60 (D. Mass. 1997), the U.S. District Court asserted that ERISA preemption law "has been in flux since the Supreme Court commented on the potentially infinite reach of 'relations' and 'connections'" in *Travelers*, and that pre-*Travelers* cases "do not reveal the proper way to analyze ERISA preemption." 973 F. Supp. at 64-65. The Court rejected pre-*Travelers* cases holding state regulation of ERISA plan provider networks preempted because "without the benefit of the most recent Supreme Court pronouncements, their analyses are not useful here." *Id.* With this perception of a significant change in ERISA preemption doctrine as a result of *Travelers*, the District Court adopted a very restrictive view of what constitutes plan administration, and concluded that Massachusetts' "any willing provider" statute did not effect plan administration:

> ERISA's concern with preserving a sphere for uniform plan administration was limited to activities involving claims and fund management. Selection of service providers and operation of provider networks has "too tenuous, remote, and peripheral" a connection with plan administration to warrant preemption.

973 F. Supp. at 69.

The analysis of these cases cannot be squared with this Court's preemption decisions or the prior cases holding that the state regulation of ERISA plan provider networks is preempted by ERISA. The second Michigan Court of Appeals' decision in this case, the Connecticut Supreme Court's decision in *Napoletano*, and the federal district court's decision in *American Drug Stores*, demonstrate the degree to which misinterpretation and misapplication of this Court's *Travelers* decision has detrimentally affected ERISA preemption analysis. This Court's emphasis on the limitations of ERISA preemption in *Travelers* has been used by lower courts to allow extensive state regulation of ERISA plans. Thus, without further clarification, *Travelers* threatens the significant and historic body of ERISA preemption law — even in core areas of ERISA preemption — that this Court has spent so much time developing over the last fifteen years, and upon which national companies and unions have relied. See *DeBuono v. NYSA-ICLA Medical and Clinical Services Fund,* U.S. , 117 S. Ct. 1747, fn. 1 (1997). The law of ERISA preemption developed by this Court in its prior decisions may be undone, generating a whole new round of ERISA preemption litigation based on *Travelers.*

This Court thus needs to clarify its decision in *Travelers* so as to preclude subordinate courts from reaching the erroneous conclusion that Michigan's courts have reached here. In the absence of clarification by this Court, ERISA-regulated plans will to be subjected to a variety of disparate state regulations.

B. This Case Presents An Important And Recurring Issue Of Whether State Preferred Provider Laws Can Regulate ERISA Self-Insured Plans

At least 30 states have statutes regulating the use of preferred provider agreements and programs in the provision of

health care benefits.[2] As discussed above, these statutes have already generated several conflicting decisions as to whether they are preempted by ERISA. In light of the unbiquitousness of the use of preferred provider networks by ERISA plans, and state regulation of such use, litigation of this preemption issue will undoubtedly continue until it is finally decided by this Court.

This preemption issue is an important one deserving resolution by this Court. The use of preferred provider networks has become an increasingly important tool in reducing health care costs and managing the provision of health care benefits. The ability of multi-state ERISA plans to utilize this tool depends, to a great extent, on whether ERISA protects them from the vagaries of differing state requirements. If such regulation is not preempted, ERISA plans effectively will be denied the opportunity to use this managed care approach to health care in multi-state and national plans. Such a result could discourage employers from providing health care benefits at all, restrict the benefits provided, and undermine the financial stability of ERISA health plans.

---

[2] These states and their preferred provider statutes include at least the following: Ala. Code § 27-1-19 (1996); Conn. Gen. Stat. § 38a-553 (1997); Fla. Stat. ch. 627.6471 (1997); Ga. Code Ann. § 33-30-20 (1997) *et seq*; Ill. Rev. Stat. ch. 215, para. 370j (1997) (exempts ERISA plans from state regulations); Iowa Code § 514F.2 (1997); Ky. Rev. Stat. Ann. § 304.17A-300 (Baldwin 1997); La. Rev. Stat. Ann. § 40:2203 (West 1997); Me. Rev. Stat. Ann. tit. 24-A § 2672, 2673 (West 1997); Md. Code Ann., Ins. 14-205 (1997); Mass. Gen. L. ch. 176A § 10A (1997); Mich. Comp. Laws § 550.1502 (1997); Minn. Stat. § 62E.101, 62Q.45 (1997) (recognizes preferred provider organizations); Miss. Code Ann. § 83-41-335 (1997); Mo. Rev. Stat. § 376.427 (1997) (recognizes preferred provider organizations); Mont. Code Ann. § 33-22-1704 (1997); Neb. Rev. Stat. § 44-4109 (1997); Nev. Rev. Stat. § 689B.061 (1997); N.H. Rev. Stat. Ann. § 420-C:1 (1997); N.M. Stat. Ann. § 59A-22A-2 (Michie 1997); N.Y. Work. Comp. Law 350 (McKinney 1997) *et seq*; N.C. Gen. Stat. § 58-50-55 (1997); N.D. Cent. Code § 26.1-47-02 (1997); 40 Pa. Cons. Stat. § 764A (1997); Tex. Ins. Code Ann. art. 3.70-3L (1997); Utah Code Ann. § 31A-22-617 (1997); Va. Code Ann. § 38.2-4209 (Michie 1997); Wis. Stat. § 609.001 (1997) *et seq*; Wyo. Stat. § 26-22-503 (1997)

This case presents a straightforward opportunity for this Court to address this important and recurring issuing. Michigan's PPA directly regulates the use of preferred provider agreements. The GM/UAW Plan is self-insured so that ERISA's insurance savings clause is not implicated. The respondent's claims, including their common law claims, are typical of the state law claims asserted by those excluded from a plan's preferred provider network. Thus, the Court's decision in this case would be broadly applicable to state law claims challenging the terms and administration of ERISA plans' preferred provider programs. This Court should grant a *writ of certiorari* in this case to decide this important issue.

CONCLUSION

For these reasons, this Court should grant BCBSM's Petition for Writ of Certiorari, reverse the decision of the Court of Appeals for the State of Michigan and hold that ERISA preempts state regulation of the use of preferred provider networks by self-insured ERISA plans.

Robert P. Hurlbert
Counsel of Record
Joseph A. Fink
Robert W. Powell
Francis R. Ortiz
DICKINSON WRIGHT PLLC
500 Woodward Avenue,
Suite 4000
Detroit, MI 48226
(313) 223-3500

Richard John Matthews
Blue Cross and Blue Shield of
Michigan
600 Lafayette East, Suite 1925
Detroit, Mi 48226-1098
(313) 225-0095

Dated: January 15, 1998